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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JACOB MATTHEW JOHNSON, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Brazoria County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Jacob Matthew Johnson.

*The case was tried before the Honorable Jerri Lee Mills, Presiding Judge, County Court at Law 1 and Probate Court, Brazoria County, Texas.

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No._____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JACOB MATTHEW JOHNSON, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The court of appeals rejected the idea that the mere use of overhead emergency lights seizes an already parked car, but its analysis says otherwise. One justice says that should be the rule. Should it?

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument. The policy discussion underlying the first question presented can be had on paper, and the second question presented is a straightforward "reasonable suspicion" issue argued in the alternative.

STATEMENT OF THE CASE

Appellant pleaded guilty to possession of marijuana after his motion to

suppress was denied.[1] The court of appeals reversed, holding that appellant was seized when the officer, *inter alia*, pulled up 10 to 15 yards away with his overhead emergency lights activated.[2]

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed in a published opinion with Justice Hassan concurring.[3] No motion for rehearing was filed. The State's petition is due June 29, 2020.

GROUNDS FOR REVIEW

1. **Is the use of overhead emergency lights, combined with factors common to most consensual encounters, sufficient to seize a parked vehicle?**

2. **If appellant was seized, was it reasonable?**

ARGUMENT AND AUTHORITIES

A Fourth Amendment seizure results from "the display of official authority and the implication that this authority cannot be ignored, avoided, or terminated."[4] Although other jurisdictions have "frequently held" that "[t]he use of 'blue flashers' or police emergency lights are . . . sufficient to constitute a detention or seizure of a

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[1] 1 CR 57.

[2] Slip op. at 8-9.

[3] *Johnson v. State*, __ S.W.3d __, No. 14-18-00361-CR, 2020 WL 2832838 (Tex. App.—Houston [14th Dist.] May 28, 2020).

[4] *State v. Garcia-Cantu*, 253 S.W.3d 236, 243 (Tex. Crim. App. 2008).

citizen,"[5] "there are no *per se* rules" in Texas.[6] Instead, "[e]ach citizen-police encounter must be factually evaluated on its own terms."[7] The court of appeals acknowledged this.[8] Its analysis, however, shows the officer's emergency lights were the only factor that suggested a show of authority. In essence, it applied a *per se* rule. The concurrence expressly said this should be the case.[9] Does the use of emergency lights—on its own or in this case—seize a parked driver?

1. Use of emergency lights was the only potential indicium of authority.

Other than the use of emergency lights, the court of appeals based its conclusion on four circumstances: 1) the officer's car was the only car near appellant's, 2) he "shin[ed] a spotlight into [appellant's] car twice," 3) he "stopped his marked patrol car within ten to fifteen yards of [appellant's] vehicle," and 4) he "approached the vehicle."[10] For various reasons, none of these other circumstances do much, if anything, to establish a seizure in this case.

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[5] *Id*. at 245 n.43.

[6] *Id*. at 243.

[7] *Id*.

[8] Slip op. at 5-6 (citing *Wade v. State*, 422 S.W.3d 661, 667-68 (Tex. Crim. App. 2013), and *Garcia-Cantu*, 253 S.W.3d at 243), 8 (overhead emergency lights do not always mean a seizure of a parked car because "context matters").

[9] Concurrence at 5-7.

[10] Slip op. at 8. This was part of a preliminary "context" analysis that characterized the use of the lights before it "examin[ed] all of the circumstances of the interaction in a light most favorable to the trial court's ruling[,]" slip op. at 8, but it is the only analysis with any detail.

Shining a spotlight on a vehicle as the officer approaches can show authority, as in *Garcia-Cantu*. But the relevant findings (and evidence) in this case suggest only that appellant's car was spotlighted at some point as part of the officer's routine patrol of the lot, not that they were used after he decided to stop and approach.[11]

The remaining circumstances are unremarkable for the same reason: when the only issue is whether a police encounter was consensual, the things that make it a police encounter do not matter. There would not be any encounter without one of the parties moving towards the other, and having the officer approach must be better than telling the civilian to come. Similarly, the absence of other cars nearby would be relevant only if appellant's awareness that he was the officer's focus was at issue, as in an evading case. It was not. And if uniforms or markings are relevant, they are also superfluous once emergency lights go on.

The court of appeals conceded that appellant's vehicle was not blocked by the patrol car,[12] and there is no evidence the officer "used an authoritative, commanding voice" or the like.[13] It is difficult to see how the emergency lights were not just the central circumstance supporting seizure but the only relevant one. Despite its stated intent, the court of appeals reversed using a *per se* rule.

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[11] 1 CR 30 (Findings 3, 5). The findings are appended. The officer shined his spotlight "across the vehicle" as he was "scanning" "or doing a sweep" with it. 1 RR 18, 21, 25, 26.

[12] Slip op. at 7; 1 CR 30 (Finding 7).

[13] *See Garcia-Cantu*, 253 S.W.3d at 245.

2. Emergency lights shouldn't be enough to "seize" a parked person.

Ironically, the majority explained why emergency lights do not necessarily mean a parked car has been seized: "a police officer might activate the overhead emergency lights for safety purposes, to avoid getting hit by passing cars or causing an accident."[14] The officer in this case gave two more reasons: to activate his recording devices and "so nobody shoots me."[15] The officer in one of this Court's community care-taking cases said something similar.[16] These are all non-seizure reasons to activate lights that reasonable, law-abiding people can appreciate.[17] Adopting a *per se* rule would ignore this reality.

3. What does it take to prove reasonable suspicion of criminal activity in a high crime area?

If the use of emergency lights a seizure makes, or if the totality of the circumstances establish one in this case, the evidence justified a temporary seizure to confirm or dispel the officer's suspicion "that *something* of an apparently criminal nature [wa]s brewing."[18]

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[14] Slip op. at 8.

[15] 1 RR 20, 27-28.

[16] *Gonzales v. State*, 369 S.W.3d 851, 853 (Tex. Crim. App. 2012) (the officer "activated both his front-facing and rear-facing overhead red and blue lights to notify Gonzales that it was the police and not 'some bad guy' who had pulled in behind him.").

[17] *See Florida v. Bostick*, 501 U.S. 429, 438 (1991) ("the 'reasonable person' test presupposes an innocent person.").

[18] *Derichsweiler v. State*, 348 S.W.3d 906, 917 (Tex. Crim. App. 2011) (emphasis in original).

The officer was very familiar with this park-and-ride lot.[19] He knew how it was lawfully used at that time of night, and how unusual it was for people to sit in a car parked away from other cars.[20] He had been out there "a lot" over ten years in the county, including three of four times in the months preceding this incident,[21] and knew it to be home to a variety of criminal activities including burglaries of motor vehicles, drug crimes, and public lewdness.[22] That is why he spotlights the vehicles as he drives through at night.[23] From this testimony, the trial court found the park and ride was "a high crime area for burglaries of motor vehicles, drug crimes, and public lewdness."[24]

The court of appeals rejected the trial court's finding and the officer's underlying testimony because the officer failed to specify 1) the type of calls he responded to or their results, and 2) the number of times that the listed offenses were committed there.[25] In doing so, it failed to apply the proper deference to the trial

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[19] 1 RR 27.

[20] 1 RR 27.

[21] 1 RR 16, 17.

[22] 1 RR 16.

[23] 1 RR 18; 1 CR 30 (Finding 3).

[24] 1 CR 30 (Finding 4). It also found that the officer "testified that he had personally made several arrests in the months prior to this offense for such offenses in that park and ride[,]" but the fact that arrests were made is not supported by the record.

[25] Slip op. at 10-13.

court. The officer's testimony showed sufficient familiarity with the area for a judge to conclude that appellant's activity warranted a brief detention.[26] It was at least within the zone of reasonable disagreement.[27] The court of appeals concluded otherwise because it required extensive details and statistics regarding the officer's experience and knowledge before the trial court could accept it as true. That requirement was recently rejected by this Court.[28] It should be rejected again.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review, reverse the decision of the court of appeals, and affirm appellant's conviction.

Respectfully submitted,

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[26] *See*, *e.g.*, *Derichsweiler*, 348 S.W.3d at 917 (reviewing a detention in a parking lot and concluding, "Under these circumstances, the Fourth Amendment permits the police to make a brief stop to investigate, if only by their presence to avert an inchoate offense.").

[27] *State v. Cortez*, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018) (affirming the standard).

[28] *Ramirez-Tamayo v. State*, 537 S.W.3d 29, 37 (Tex. Crim. App. 2017) (trial court has authority to conclude officer is credible and accept his testimony that seemingly innocent circumstances are suspicious based on his training and experience).

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool the applicable portion of this document contains 1,392 words.

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this June 29, 2020, the State's Petition for Discretionary Review was served electronically on the parties below:

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APPENDIX

Reversed and Remanded and Majority and Concurring Opinions filed May 28, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00361-CR

JACOB MATTHEW JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 1 & Probate Court
Brazoria County, Texas
Trial Court Cause No. 224018

M A J O R I T Y O P I N I O N

Appellant Jacob Matthew Johnson appeals his conviction for possession of marijuana. In two issues, he challenges the trial court's denial of his motion to suppress evidence on the basis that it was obtained pursuant to an unlawful detention. We reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with possession of marijuana in an amount of two ounces or less, a Class B misdemeanor. *See* Tex. Health & Safety Code Ann. §481.121(b)(1). He filed a motion to suppress. At the suppression hearing, Officer Robert Cox of the Brazoria County Sherriff's Office was the only witness.

Officer Cox testified he was on patrol around midnight on August 28, 2016, when he noticed a "suspicious vehicle" in a park-and-ride parking lot (the "Parking Lot"). Officer Cox shined his spotlight twice across the vehicle, saw movement inside the vehicle, and could tell that that two people occupied it. The vehicle had no headlights or other lights turned on. Officer Cox stopped his marked patrol car within ten to fifteen yards of the vehicle and activated his overhead emergency lights. He cautiously approached the driver's side of the vehicle. When the vehicle's window came down and Officer Cox made contact with appellant, Officer Cox detected the odor of marijuana, and he noticed that appellant's shorts were unbuttoned and unzipped.

The State offered the video recording from Officer Cox's patrol car, but appellant objected that this exhibit was not relevant. The trial court sustained the objection and did not admit the exhibit into evidence. No other exhibit was admitted into evidence at the suppression hearing, so Officer Cox's testimony was the only evidence before the trial court for the motion to suppress.

The trial court signed an order denying appellant's motion to suppress in June 2017, and in August 2017, signed the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The charged offense that is the subject of this case occurred on or about August 28, 2016. R. at 13.

2. Sergeant Robert Cox testified that he was on routine patrol around 12 AM. R. at 13.

3. Sergeant Cox further testified that as part of his routine patrol, he regularly checks the park and ride located at the intersection of FM 2004 and FM 523. He regularly spotlights vehicles parked overnight in that park and ride to deter drug activity and burglaries. R. at 15-8.

4. The park and ride at the intersection of FM 2004 and FM 523 is a high crime area for burglaries of motor vehicles, drug crimes, and public lewdness. Sergeant Cox testified that he had personally made several arrests in the months prior to this offense for such offenses in that park and ride. R. at 15-8.

5. While conducting his routine patrol on or about the day in question, Sergeant Cox spotted the defendant's vehicle parked in the park and ride and observed movement inside. Other vehicles were present in the park and ride and that defendant's vehicle was parked away from the other vehicles. R. at 18.

6. Sergeant Cox parked behind defendant's vehicle then turned on his overhead lights. R. at 20, 26.

7. Sergeant Cox did not block the defendant's vehicle from leaving when he parked behind it. R. at 21-2.

8. Sergeant Cox then approached defendant's vehicle. R. at 18, 20.

9. Once the defendant rolled down his window, Sergeant Cox observed the defendant's pants to be undone and detected the smell of marihuana. R. at 22.

10. A copy of Sergeant Cox's in-car video was offered but not admitted into evidence. R. at 28-9.

CONCLUSIONS OF LAW

1. Officers do not need reasonable suspicion to initiate a consensual encounter with a citizen. *State v. Woodard*[,] 341 S.W.3d 404 (Tex. Crim. App. 2011). Sergeant Cox's initial encounter with the defendant was a proper consensual encounter that later evolved into an investigative detention.

2. The sole fact that Sergeant Cox activat[ed] his overhead lights alone did not elevate the consensual encounter into an investigative detention[.] *State v. Garcia-Cantu*[,] 253 S.W.3d 236, 242-3 (Tex. Crim. App. 2008).

> 3. If the initial encounter was a detention, it was properly supported by reasonable suspicion of criminal activity as necessary to detain the defendant based on specific, articulable facts, namely: his presence in the park and ride, a high crime area, after the park and ride's normal operating hours. *Terry v. Ohio*[,] 391 U.S. 1 (1968); *Amorella v. State*[,] 554 S.W.2d 700 (Tex. Crim. App. 1981); *Bryant v. State*[,] 161 S.W.3d 758 (Tex. App.-2nd Dist. 2005)(no pet).

At a bench trial in May 2018, appellant entered a plea of "guilty." The trial court found appellant guilty and assessed his punishment at three days' confinement in jail with a three-day credit and a $500 fine. Appellant filed a timely appeal.

II. ISSUES AND ANALYSIS

Appellant argues under his first issue that the interaction between Officer Cox and appellant was a seizure rather than a consensual encounter. Under his second issue, appellant asserts that Officer Cox lacked reasonable suspicion to lawfully detain him.

In reviewing a trial court's ruling on a motion to suppress, we apply an abuse-of-discretion standard, and we overturn the trial court's ruling only if it falls outside the zone of reasonable disagreement. *Martinez v. State*, 348 S.W.3d 919, 922 (Tex. Crim. App. 2011). We apply a bifurcated standard of review, giving almost total deference to a trial court's determination of historical facts and mixed questions of law and fact that rely upon the credibility of a witness, but applying a *de novo* standard of review to pure questions of law and mixed questions that do not depend on credibility determinations. *Id*. at 922–23. In a motion-to-suppress hearing, the trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Baird v. State*, 398 S.W.3d 220, 226 (Tex. Crim. App. 2013). Thus, the trial court may believe or disbelieve all or any part of a witness's testimony, even if that testimony is not controverted. *Id*.

When a trial court makes written findings of fact, as it did in this case, we

examine the record in the light most favorable to the ruling and uphold those fact findings so long as the record supports them. *Id*. We then determine *de novo* the legal significance of the facts as found by the trial court. *Id*. We will sustain the trial court's ruling if the record reasonably supports that ruling and is correct on any theory of law applicable to the case. *Valtierra v. State*, 310 S.W.3d 442, 447–48 (Tex. Crim. App. 2010).

A. Does the record support the trial court's determination that no investigative detention occurred before the car window was lowered?

Under his first issue appellant asserts a Fourth Amendment seizure had occurred before the car window was lowered. The law recognizes three distinct types of police/citizen interactions: (1) consensual encounters that do not implicate the Fourth Amendment; (2) investigative detentions that are Fourth Amendment seizures of limited scope and duration that must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of Fourth Amendment seizures, that are reasonable only if supported by probable cause. *Wade v. State*, 422 S.W.3d 661, 667 (Tex. Crim. App. 2013). Police officers are as free as any other citizen to approach citizens to ask for information or cooperation. *Id*. These consensual encounters may be uncomfortable for a citizen, but they are not Fourth Amendment seizures. *Id*.

No bright-line rule governs when a consensual encounter becomes a detention. *Id*. Courts must take into account the totality of the circumstances of the interaction to decide whether a reasonable person would have felt free to ignore the police officer's request or terminate the consensual encounter. *Id*. Under the Fourth Amendment caselaw, courts presume that a reasonable person has considerable fortitude. *Id*. at 667, n.19. The law views an encounter as a consensual interaction and, as such, the citizen may terminate the encounter at any time. *Id*. at 667–68. If

ignoring the request or terminating the encounter is an option, then no Fourth Amendment seizure has occurred. *Id*. at 668. But, if an officer through force or a show of authority sufficiently conveys the message that the citizen is not free to leave or to ignore the officer's request, the encounter is no longer consensual; it is a Fourth Amendment detention or arrest, subject to Fourth Amendment scrutiny. *Id*. The question of whether the particular facts show that a consensual encounter has evolved into a detention is a legal issue that we review *de novo*. *Id*.

In considering police contacts with citizens seated in parked cars, the Court of Criminal Appeals has stated that the following approach "is useful when examining police contacts with citizens in parked cars":

> The mere approach and questioning of [citizens seated in parked cars] does not constitute a seizure. The result is not otherwise when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so. Likewise, the encounter becomes a seizure if the officer orders the suspect to "freeze" or to get out of the car. So too, other police action which one would not expect if the encounter was between two private citizens—boxing the car in, approaching it on all sides by many officers, pointing a gun at the suspect and ordering him to place his hands on the steering wheel, or use of flashing lights as a show of authority—will likely convert the event into a Fourth Amendment seizure.

State v. Garcia-Cantu, 253 S.W.3d 236, 243 (Tex. Crim. App. 2008) (quoting 4 Wayne R. LaFave, *Search and Seizure* § 9.4(a), at 433–35 (4th ed. 2004)) (footnotes omitted).

Courts must factually evaluate citizen/police encounters on a case-by-case basis, each on its own terms; there are no *per se* rules. *See Garcia-Cantu*, 253 S.W.3d at 243. This test is necessarily imprecise, because it is designed to assess

the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. *Id*. at 243–44. What constitutes a restraint on liberty prompting a reasonable person to conclude that he is not free to leave or to ignore the officer's request will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs. *Id*. at 244. The officer's conduct is the primary focus, but time, place, and attendant circumstances matter as well. *Id*. A court must step into the shoes of the defendant and determine from a common, objective perspective whether the defendant would have felt free to leave or to ignore the officer's request. *Id*.

Officer Cox described his actions on the night of the arrest, testifying to the following facts:

- He was conducting a routine patrol around midnight when he checked the Parking Lot and saw a vehicle parked there.
- He shined his spotlight across the Parking Lot and twice across the vehicle.
- He saw movement and two people inside the vehicle.
- The vehicle had no headlights or other lights turned on, and no other vehicles were near it.
- He stopped his marked patrol car within ten to fifteen yards of the other vehicle, and he did not block the other vehicle in a way that prevented it from exiting the Parking Lot.
- He activated his overhead emergency lights so that it looked like "a normal police car pulling somebody over [to give the person] a traffic ticket."
- Activating the patrol car's overhead emergency lights turned on the patrol car's audio and video system.
- Officer Cox cautiously approached the driver's side of the vehicle.
- When the vehicle's window came down and he made contact with appellant, Officer Cox detected the odor of marijuana, and he noticed that appellant's shorts were unbuttoned and unzipped.

The Court of Criminal Appeals has noted that fact patterns involving a police officer's use of a patrol car's overhead emergency lights are frequently held sufficient to constitute an investigative detention of a citizen, whether in a parked car or a moving car. *See Garcia-Cantu*, 253 S.W.3d at 245 n. 43. Still, courts must consider the circumstances. Though a patrol car's overhead emergency lights tell people to "stop," the message is not always in a seizure context. For example, sometimes, after pulling over on the side of a roadway at night, a police officer might activate the overhead emergency lights for safety purposes, to avoid getting hit by passing cars or causing an accident. So, while flashing overhead emergency lights signal "stop," context matters.

In this context, Officer Cox's patrol car was in a parking lot around midnight with no cars in the area other than the car that Officer Cox was examining. After shining a spotlight into that car twice, Officer Cox stopped his marked patrol car within ten to fifteen yards of the other vehicle, turned on his overhead emergency lights, and approached the vehicle. In this context, Officer Cox's use of the overhead emergency lights weighs in favor of concluding that a reasonable person would not have felt free to leave the Parking Lot or to ignore a request by Officer Cox to lower the car window. *See id.* at 243, 245 n. 43. Nonetheless, this fact does not mandate that conclusion, and we still must look to the totality of the circumstances of the interaction. *See id.* at 243–45; *Wade*, 422 S.W.3d at 667. After examining all of the circumstances of the interaction in a light most favorable to the trial court's ruling, the evidence at the suppression hearing demonstrates that Officer Cox, through a show of authority, sufficiently conveyed the message that appellant was not free to leave the Parking Lot or to ignore a request to lower the car window. *See Wade*, 422 S.W.3d at 668; *Garza v. State*, 771 S.W.2d 549, 557–58 (Tex. Crim. App. 1989); *Klare v. State*, 76 S.W.3d 68, 73 (Tex. App.—Houston [14th Dist.] 2002, pet ref'd).

Therefore, we conclude that an investigative detention and seizure had occurred before the car window was lowered. *See Garza*, 771 S.W.2d at 557–58; *Klare*, 76 S.W.3d at 73.

B. Does the record support the trial court's determination that at the time of the seizure, Officer Cox had reasonable suspicion to warrant an investigative detention?

Appellant contends in his second issue that the trial court erroneously denied his motion to suppress because Officer Cox lacked reasonable suspicion to detain him. Reasonable suspicion of criminal activity permits a temporary seizure for questioning that is limited to the reason for the seizure. *Wade*, 422 S.W.3d at 668. A police officer has reasonable suspicion for a detention if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead the officer reasonably to conclude that the person detained is, has been, or soon will be engaged in criminal activity. *Id*. This standard is an objective one that calls for the court to disregard the actual subjective intent of the arresting officer and look, instead, to whether an objectively justifiable basis for the detention existed. *Id*.

In applying the standard courts also look to the totality of the circumstances; individual circumstances may seem innocent enough in isolation, but if they combine in a way that reasonably would suggest the imminence of criminal conduct, the law will deem an investigative detention justified. *Id*. The facts need not point to a particular and distinctively identifiable criminal offense. *Johnson v. State*, 444 S.W.3d 209, 214 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). "It is enough to satisfy the standard of reasonable suspicion that the information is sufficiently detailed and reliable—*i.e.*, it supports more than an inarticulate hunch or intuition—to suggest that something of an apparently criminal nature is brewing." *Wade*, 422 S.W.3d at 668. To support a reasonable suspicion, "articulable facts must show 'that

some activity out of the ordinary has occurred, some suggestion to connect the detainee to the unusual activity, and *some indication that the unusual activity is related to crime*.'" *Martinez v. State*, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011) (emphasis added). As with the question of whether a consensual encounter has become a Fourth Amendment detention, we review *de novo* the question of whether a certain set of historical facts gives rise to reasonable suspicion. *Id*. at 669. When a defendant asserts an unlawful detention under the Fourth Amendment, the defendant bears the burden of producing evidence to rebut the presumption of proper conduct by law enforcement officers. *See State v. Woodard*, 341 S.W.3d 404, 412 (Tex. Crim. App. 2011). A defendant can satisfy this burden with evidence that the detention occurred without a warrant. *See id*. In today's case the State stipulated that there was no warrant, so the State had the burden to show reasonable suspicion. *See id*.

The trial court found that the Parking Lot was a high crime area for burglaries of motor vehicles, drug crimes, and public lewdness. According to the trial court, Officer Cox testified that he had made several arrests for these types of offenses in the months before the charged offense. Officer Cox did not testify that he personally had made several arrests in the Parking Lot for these types of offenses in that time period. Instead, Officer Cox testified that in the months around the time of the charged offense, he had gone to that Parking Lot three of four times "[f]or calls of service." He did not identify the nature of the service calls, nor did he say whether he made an arrest during any of these calls. Officer Cox did not testify that he made any arrests at the Parking Lot for burglary of a motor vehicle, a drug crime, or public lewdness. Officer Cox did testify that he had patrolled the area including the Parking Lot for at least ten years and that there were burglaries of motor vehicles, drug crimes, and public lewdness in the Parking Lot. Officer Cox never specified how

many of these criminal offenses had occurred there. He testified that he had responded to calls to the Parking Lot on "[s]everal occasions," but he did not state the reason for these calls or whether he made any arrests as a result of these calls. Officer Cox also stated that over ten years he had "been out there . . . a lot," but he did not state whether he was there as part of his patrol duties or whether he had been called there as a result of possible criminal activity. Again, Officer Cox did not state that he made any arrests during the times that he went to the Parking Lot. Nor did he testify that the Parking Lot was a high crime area. Officer Cox also testified that he has had to make some calls for service to the Parking Lot for criminal activity. He did not state how many times he made these calls or for what criminal activity.

After examining the record in the light most favorable to the trial court's ruling, we conclude that the record does not support the trial court's findings that the Parking Lot is a high crime area for burglaries of motor vehicles, drug crimes, and public lewdness and that Officer Cox testified he had made several arrests for these types of offenses in the months prior to the charged offense; so, we disregard these findings. *See Baird v. State*, 398 S.W.3d 220, 226 (Tex. Crim. App. 2013); *Miller v. State*, 393 S.W.3d 255, 263–64 (Tex. Crim. App. 2012).

Officer Cox testified as follows:

- He had patrolled this area for more than ten years.
- There were burglaries of motor vehicles, drug crimes, and public lewdness in that Parking Lot.
- He was familiar with the Parking Lot, had "been out there . . . a lot."
- In the months around the time of the charged offense, Officer Cox had gone to that Parking Lot three of four times "[f]or calls of service."
- He testified that he had responded to calls to that Parking Lot on "[s]everal occasions."

- Officer Cox has had to make some calls for service to the Parking Lot for criminal activity.
- The Parking Lot was open and was a 24-hour park-and-ride parking lot.
- People mainly use the Parking Lot during the daytime, but some people park there and walk to a nearby bar that does not have a big parking lot.
- It is out of the ordinary for somebody to be in a parked car in the Parking Lot after midnight with no other vehicle there to pick them up.
- Officer Cox was conducting a routine patrol around midnight when he checked this Parking Lot.
- Officer Cox saw a vehicle parked in the Parking Lot.
- Officer Cox shined his spotlight across the Parking Lot and twice across the vehicle.
- Officer Cox saw movement in the vehicle and could tell it was occupied by two people.
- The vehicle had no headlights or other lights turned on, and no other vehicles were near it.

In *Klare v. State*, this court determined that a police officer lacked reasonable suspicion to stop the truck the defendant was driving based on the following articulable facts: (1) it was 2:30 a.m.; (2) while driving on a highway, the officer saw a truck parked behind a shopping center; (3) the businesses in the shopping center were closed; (4) there had been burglaries at the shopping center in the past, though the police officer did not say how recent or how many; (5) the officer turned into the parking lot shortly afterwards and discovered that the truck was gone; (6) the officer then turned onto an adjoining road and within fifteen to twenty seconds came upon a truck that he believed to be the same as the one at the shopping center; and (7) the officer wanted to identify the truck. 76 S.W.3d 68, 71 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). Our court noted that a given locale's being well-known for criminal activity does not by itself justify a detention but is among the various factors that may be taken into account. *Id*. at 74. Although relevant to our analysis, both

time of day and the level of criminal activity in the area are facts that go to the suspect's surroundings rather than the suspect himself. *Id*. at 75. Consequently, courts generally require something else particular to the suspect's behavior to justify a suspicion of criminal activity. *Id*. The *Klare* court stated that the police officer did not have any prior knowledge of the appellant in that case or witness any suspicious or unlawful activity. *Id*. at 77. The *Klare* court concluded that the record did not support a finding that the police officer had reasonable suspicion to detain appellant and that the trial court erred in denying appellant's motion to suppress. *See id*.

Under the applicable standard of review, examining the record in the light most favorable to the trial court's ruling, we conclude that the record does not reasonably support the trial court's determination that Officer Cox had reasonable suspicion to detain appellant. *See Gurrola v. State*, 877 S.W.2d 300, 302–05 (Tex. Crim. App. 1994); *Klare*, 76 S.W.3d at 73–77. Even under the deferential standard of review, we conclude that Officer Cox lacked specific, articulable facts that, when combined with rational inferences from those facts, would lead him reasonably to conclude that appellant was, had been, or soon would be engaged in criminal activity. *See Gurrola*, 877 S.W.2d at 302–05; *Klare*, 76 S.W.3d at 73–77. Therefore, the trial court erred in denying appellant's motion to suppress.

C. Is the trial court's error in denying the motion to suppress reversible?

Having determined that the trial court erred in denying appellant's motion to suppress, we now consider whether this error is reversible. *See* Tex. R. App. P. 44.2. The error violated appellant's federal constitutional rights. *Torres v. State*, 182 S.W.3d 899, 901, 903 (Tex. Crim. App. 2005). The Court of Criminal Appeals has stated that appellate courts are not to speculate as to an appellant's reasons for

entering a "guilty" plea or as to whether appellant would have done so if the motion to suppress had been granted. *See McKenna v. State*, 780 S.W.2d 797, 799–800 (Tex. Crim. App. 1989); *Paulea v. State*, 278 S.W.3d 861, 867 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). As long as the evidence that should have been suppressed "would in *any* measure inculpate the accused," we must presume that the trial court's denial of appellant's motion to suppress influenced appellant's decision to plead "guilty" and is reversible error. *See McKenna*, 780 S.W.2d at 799–800; *Paulea*, 278 S.W.3d at 867. Because the evidence seized, namely the marijuana that appellant was charged with possessing, was inculpatory, we presume the trial court's erroneous denial of appellant's motion to suppress influenced appellant's decision to plead "guilty." *See Paulea*, 278 S.W.3d at 867. Therefore, the error is reversible.

III. CONCLUSION

When Officer Cox activated his emergency overhead lights and left his patrol car to make contact with appellant's vehicle, an investigative detention occurred and no reasonable suspicion supported that detention. The trial court abused its discretion in denying appellant's motion to suppress. Having found this error reversible, we sustain appellant's two issues, reverse the trial court's judgment, and remand for further proceedings consistent with this opinion.

/s/ *Kem Thompson Frost*
Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Wise and Hassan (Hassan, J., concurring).

Publish — Tex. R. App. P. 47.2(b).

Reversed and Remanded and Majority and Concurring Opinions filed May 28, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00361-CR

JACOB MATTHEW JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 1 & Probate Court
Brazoria County, Texas
Trial Court Cause No. 224018

CONCURRING OPINION

Appellant argues the trial court erred in denying his motion to suppress because (1) the interaction between Officer Cox and Appellant was not a consensual

encounter, and (2) Officer Cox lacked reasonable suspicion to lawfully detain him. I concur in the majority's disposition of Appellant's issues, but disagree with certain portions of the majority's analysis.

I. Governing Law

There are three distinct categories of interactions between police officers and citizens: (1) encounters, (2) investigative detentions, and (3) arrests. *Johnson v. State*, 414 S.W.3d 184, 191 (Tex. Crim. App. 2013). In determining which category an interaction falls into, courts look at the totality of the circumstances. *Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010). An encounter is a consensual interaction which the citizen is free to terminate at any time. *Id*. Unlike an investigative detention and an arrest, an encounter is not considered a seizure triggering Fourth Amendment protection. *Id*. "An encounter takes place when an officer approaches a citizen in a public place to ask questions, and the citizen is willing to listen and voluntarily answers." *Id.*

Conversely, an investigative detention occurs when a person yields to a police officer's show of authority under a reasonable belief that he is not free to leave. *Id*. In considering police contacts with citizens seated in parked cars, the Court of Criminal Appeals provided examples that "will likely convert" encounters into Fourth Amendment seizures: "boxing the car in, approaching it on all sides by many officers, pointing a gun at the suspect and ordering him to place his hands on the steering wheel, *or use of flashing lights as a show of authority*." *See State v. Garcia-Cantu*, 253 S.W.3d 236, 243 (Tex. Crim. App. 2008) (emphasis added) (quoting 4 Wayne R. LaFave, *Search and Seizure* § 9.4(a), at 427 (4th ed. 2004)) (footnotes omitted).

Nonetheless, the court reiterated that each citizen-police encounter must be factually evaluated on its own terms because there are no *per se* or bright-line rules

in determining whether a police-citizen interaction is an encounter or an investigatory detention. *See id*. When a court is conducting its determination of whether an interaction constituted an encounter or a detention, it focuses on whether the police officer conveyed a message that compliance with the officer's request was required. *Crain*, 315 S.W.3d at 49.

Because the Fourth Amendment to the United States Constitution protects a citizen from unreasonable searches and seizures at the hands of government officials, reasonable suspicion must support investigative detentions. *Id*. at 52. Reasonable suspicion exists if a police officer "has specific, articulable facts that, combined with rational inferences from those facts," reasonably lead to the conclusion that the person detained is, has been, or will soon be engaged in criminal activity. *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011).

This standard is an objective one that disregards the actual subjective intent of the police officer and looks to whether there was an objectively justifiable basis for the detention. *Id*. This standard looks to the totality of the circumstances. *Id*. It considers not whether particular conduct is innocent or criminal, but instead the degree of suspicion that attaches to particular noncriminal acts. *Id*. Although circumstances may all seem innocent enough in isolation, if they combine to reasonably suggest criminal conduct is imminent, an investigative detention is justified. *Id*.

Further, the facts need not point to a particular and distinctively identifiable criminal offense. *Johnson v. State*, 444 S.W.3d 209, 214 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd); *see also Derichsweiler*, 348 S.W.3d at 916. It is only necessary for the information to be sufficiently detailed and reliable to "suggest that *something* of an apparently criminal nature is brewing" or afoot. *Derichsweiler*, 348 S.W.3d at 916-17 (emphasis in original). "However, although it may be a 'close

call,' the information must amount to more than a mere hunch or intuition." *Johnson*, 444 S.W.3d at 214 (citing *Derichsweiler*, 348 S.W.3d at 916-17). To support a reasonable suspicion, "articulable facts must show 'that some activity out of the ordinary has occurred, some suggestion to connect the detainee to the unusual activity, and *some indication that the unusual activity is related to crime*.'" *Derichsweiler*, 348 S.W.3d at 916 (emphasis in original) (quoting *Meeks v. State*, 653 S.W.2d 6, 12 (Tex. Crim. App. 1983), *abrogated by Holcomb v. State*, 745 S.W.2d 903 (Tex. Crim. App. 1988)).

When a defendant asserts an unlawful detention under the Fourth Amendment, the defendant bears the burden of producing evidence to rebut the presumption of proper conduct by law enforcement. *See State v. Woodard*, 341 S.W.3d 404, 412 (Tex. Crim. App. 2011). A defendant can satisfy this burden with evidence that the detention occurred without a warrant. *See id*. If the defendant satisfies the initial burden, the burden then shifts to the State to establish that the detention was nonetheless reasonable because it was supported by reasonable suspicion. *See id*. The State meets this burden by presenting specific facts known to the police officer at the moment of the detention. *See id*.

In this case, Appellant argues he was unlawfully detained when Officer Cox activated the police car's overhead lights and therefore Officer Cox's initial encounter with Appellant was not a consensual encounter. I agree.

II. The use of overhead emergency lights constituted a seizure.

"A court must step into the shoes of the defendant and determine from a common, objective perspective whether the defendant would have felt free to leave." *Garcia-Cantu*, 253 S.W.3d at 244 (citing *United States v. Steele,* 782 F. Supp. 1301, 1309 (S.D. Ind. 1992)). Appellant's counsel secured the following description of the overhead lights at the hearing: "[S]o if you turned on your overhead lights, it

would be like a normal police car pulling somebody over if you got a traffic ticket. Right? I mean, that's what your vehicle looked like?" Officer Cox replied: "Yes, sir."

Despite citing *Garcia-Cantu*, the trial court erroneously concluded that the officer's use of overhead emergency lights under these facts did not constitute a seizure. *See Garcia-Cantu*, 253 S.W.3d at 245 n.43 ("[t]he use of 'blue flashers' or police emergency lights are frequently held sufficient to constitute a detention or seizure of a citizen, either in a parked or moving car.").[1]

"Overhead emergency lights are synonymous with an instruction to stop." *Hughes v. State*, 337 S.W.3d 297, 301 (Tex. App.—Texarkana, no pet.); *see also*

[1] (Citing *Hammons v. State*, 940 S.W.2d 424, 427-28 (Ark. 1997) (defendant sitting in parked automobile was seized when police activated blue light; light was display of authority that would indicate to a reasonable person he was not free to leave); *People v. Bailey*, 222 Cal. Rptr. 235, 236-37 (Cal. Ct. App. 1985) (officer pulled in behind parked car and activated emergency lights; defendant seized as reasonable person would not have felt free to leave); *State v. Donahue*, 742 A.2d 775, 779-80 (Conn. 1999) (defendant was seized when officer pulled up behind parked vehicle and activated red, yellow, and blue flashing lights); *Hrezo v. State*, 780 So. 2d 194, 195 (Fla. Dist. Ct. App. 2001) (when a police officer turns the emergency and takedown lights on behind a lawfully parked vehicle, a reasonable person in that vehicle would expect to be stopped if he or she drove away); *Lawson v. State*, 707 A.2d 947, 949-50 (Md. Ct. Spec. App. 1998) (the activation of the emergency lights was a show of authority that constituted a seizure because it communicated to a reasonable person in the parked car that there was an intent to intrude upon the defendant's freedom to move away); *State v. Walp*, 672 P.2d 374, 375 (Or. Ct. App. 1983) (use of emergency lights after defendant had voluntarily stopped was sufficient show of authority and reasonable person would not have felt free to leave); *State v. Gonzalez*, 52 S.W.3d 90, 97 (Tenn. Crim. App. 2000) (a police officer clearly initiates a seizure by turning on his blue lights behind a parked vehicle because the lights convey the message that the occupants are not free to leave); *State v. Burgess*, 657 A.2d 202, 203 (Vt. 1995) (even if officer subjectively intends to activate his blue lights for safety reasons, the use of the lights on the defendant served as a restraint to prevent his departure from the pull-off area of the road); *Wallace v. Commonwealth*, 528 S.E.2d 739, 741-42 (Va. Ct. App. 2000) (driver of parked vehicle seized because a reasonable person with a police cruiser parked behind him with its emergency lights flashing would not have felt free to leave); and *State v. Stroud*, 634 P.2d 316, 318-19 (Wash. Ct. App. 1981) ("the officers' attempt to summon the occupants of the parked car with both their emergency lights and high beam headlights constituted a show of authority sufficient to convey to any reasonable person that voluntary departure from the scene was not a realistic alternative" and, had driver attempted to leave after being so signaled, he could arguably have been charged with misdemeanor)).

Klare v. State, 76 S.W.3d 68, 73 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (citing *Hernandez v. State*, 963 S.W.2d 921 (Tex. App.—San Antonio 1998, pet. ref'd) (activating emergency lights would cause a reasonable person to believe he is not free to leave)). This commonsensical interpretation of emergency lights as a signal of legitimate state-sponsored authority has been followed by the Court of Criminal Appeals,[2] this court,[3] the First Court of Appeals,[4] and other intermediate appellate courts.[5]

Reasonable people who are approached by a police vehicle with flashing overhead blue lights are expected to stay where they are and comply with officers' instructions. An unambiguous and universally accepted expression of governmental authority to "stop" (and thus not move or leave) is not a signal that means whatever

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[2] *Crain v. State*, 315 S.W.3d 43, 52 (Tex. Crim. App. 2010) (officer's use of "his patrol car's overhead lights in the appellant's direction, coupled with his request-that-sounded-like-an-order . . . caused the appellant to yield to [the officer's] show of authority — a reasonable person in appellant's shoes would not have felt free to leave or decline the officer's requests").

[3] *See Lewis v. State*, No. 14-03-01185-CR, 2005 WL 1552648, at *1 (Tex. App.—Houston [14th Dist.] July 5, 2005, pet. struck) (mem. op., not designated for publication) ("officers turned on their emergency lights to pull him over for a traffic violation"); *Hamilton v. State*, No. 14-03-01052-CR, 2005 WL 549546, at *1 (Tex. App.—Houston [14th Dist.] Mar. 10, 2005, pet. ref'd) (mem. op., not designated for publication) (the officer "activated his emergency lights to signal appellant to pull over for impeding traffic"); and *Hunter v. State*, No. 14-01-00400-CR, 2002 WL 517196, at *1 (Tex. App.—Houston [14th Dist.] Apr. 4, 2002, no pet.) (not designated for publication) ("the officers activated their emergency lights, signaling appellant to pull over").

[4] *Fenn v. State*, No. 01-10-00383-CR, 2011 WL 2651914, at *1 (Tex. App.—Houston [1st Dist.] July 7, 2011, pet. ref'd) (mem. op., not designated for publication) (the officer "activated his emergency lights to pull appellant over"); *Smith v. State*, Nos. 01-00-01311-CR, 01-00-01312-CR, 2002 WL 123345, at *1 (Tex. App.—Houston [1st Dist.] Jan. 31, 2002, no pet.) (not designated for publication) (same); *Johnson v. State*, No. 01-98-00930-CR, 2001 WL 722828, at *1 (Tex. App.—Houston [1st Dist.] June 28, 2001, pet. ref'd) (not designated for publication) (the officer "activated his patrol car's emergency lights, indicating to appellant to pull over"); and *Hilliard v. State*, Nos. 01-91-00799-CR, 01-91-00800-CR, 1992 WL 347951, at *1 (Tex. App.—Houston [1st Dist.] Nov. 25, 1992, pet. ref'd) (not designated for publication) (same).

[5] *Larry v. State*, No. 12-13-00072-CR, 2014 WL 2521593, at *1 (Tex. App.—Tyler May 30, 2014, no pet.) (mem. op., not designated for publication) and *Hudson v. State*, 247 S.W.3d 780, 785 (Tex. App.—Amarillo 2008, no pet.) (finding police officer illegally detained a pedestrian at approximately 3:50 a.m. after he activated his emergency lights and "called to him").

an arresting officer subjectively says it is intended to mean; doing otherwise would signal to the People that they need neither stop nor obey when such lights are utilized because they can now mean something other than "stop". *See Garcia-Cantu*, 253 S.W.3d at 243 ("It is the display of official authority and the implication that this authority cannot be ignored, avoided, or terminated, that results in a Fourth Amendment seizure. At bottom, the issue is whether the surroundings and the words or actions of the officer and his associates communicate the message of 'We Who Must Be Obeyed.'").

Further, I cannot agree with the majority's statement that "Though a patrol car's overhead emergency lights tell people to 'stop,' the message is not always in the seizure context." Flashing overhead blue lights are unequivocally an instruction to "stop" and thus an instruction to not leave. When a person is instructed by police to not leave, he is seized. A reasonable person would not feel free to leave when a police officer pulls up behind him with flashing overhead blue lights which are synonymous with an instruction to "stop". There is no consensual interaction when a person is instructed to stop; instead, a seizure occurs. The question then becomes whether the seizure was lawful under the circumstances of the case. Here it was not.

III. The seizure was unlawful.

A. The time of day is not itself suspicious.

Despite acknowledging that the park-and-ride was open 24 hours a day, Officer Cox testified he was suspicious because Appellant's vehicle was there after normal operating hours. "Time of day is a factor that a court may take into consideration when determining whether an officer's suspicion was reasonable; however, time of day is not suspicious in and of itself." *Klare*, 76 S.W.3d at 73-74.[6]

[6] (Citing (*inter alia*) *United States v. Cortez*, 449 U.S. 411, 420-21 (1981) (pointing out that time of day may be a legitimate, yet marginal consideration, in a reasonable suspicion

Officer Cox's suspicion was even less warranted in this case because the park-and-ride was always open. *Id.* (citing *United States v. Nicholas*, 104 F.3d 368 (10th Cir. 1996)) (pointing out that time of day has little relevance when defendant's car was parked at an establishment that was open for business twenty-four hours a day).

The Court of Criminal Appeals addressed a similar fact pattern in *Tunnell v. State*, 554 S.W.2d 697 (Tex. Crim. App. 1977). There, the arresting officer saw three men in a parked car with its lights turned off in a parking lot at 2:16 a.m.; despite knowing that a local business was open 24 hours a day, the officer thought the activity was suspicious. *Id*. at 697-98. The officer turned his car around, saw defendant's car leave the parking lot, and stopped it despite admitting that defendant "committed no traffic violations, engaged in no criminal activity, made no furtive gestures, and took no evasive action." *Id*. at 698. The Court of Criminal Appeals concluded "that the officer's investigative action was unreasonable and thus in violation of the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution." *Id.* at 699; *see also Klare*, 76 S.W.3d at 75 ("A lawful stop must be based on more than a vehicle's suspicious location or time of day."); *Collins v. State*, No. 14-06-00889-CR, 2007 WL 3287879, at *4 (Tex. App.—Houston [14th Dist.] Nov. 6, 2007, no pet.) (mem. op., not designated for publication) ("[C]ertainly, simply sitting in a parked car at 2:35 a.m. is not sufficient."). Here, there is no evidence the arresting officer saw anything more than

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analysis); *Brown v. Tex*., 443 U.S. 47, 53 (1979) (concluding that nighttime activity is not per se sufficient to create reasonable suspicion of criminal activity); *United States v. Jimenez-Medina*, 173 F.3d 752, 756 (9th Cir. 1999) (finding factors of time of day, along with four other factors, insufficient to support inference of reasonable suspicion); *Scott v. State*, 549 S.W.2d 170, 172-73 (Tex. Crim. App. 1976) (finding that time of day 1:30 a.m., even with other factors such as a high crime area and reports of hubcap thefts in the past, was insufficient to support reasonable suspicion); and *Gamble v. State*, 8 S.W.3d 452, 453-54 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (invalidating a search when a detention was based on a history of drug sales in the area, frequent calls for police assistance to the area, and time of day, *i.e.*, 3:00 a.m.)).

Appellant and a companion sitting in a parked car in a parking lot that was open for business 24 hours a day. Therefore, the officer failed to satisfy the reasonable suspicion standard because the information available to him did no more than support an "inarticulate hunch or intuition."[7]

[7] *See Derichsweiler*, 348 S.W.3d at 917; *see also Shaffer v. State*, 562 S.W.2d 853, 854-55 (Tex. Crim. App. [Panel Op.]1978) (reversing denial of motion to suppress based on a traffic stop at 3:00 a.m. where all businesses were closed, there was no traffic, and there were no pedestrians because the arresting officer "had suspicion but not an articulable fact"); *Fatemi v. State*, 558 S.W.2d 463, 466 (Tex. Crim. App. 1977) ("At the time Officer Villegas approached appellant's car, he knew the following: appellant's car had been parked, with the parking lights on, partially off the side of the road adjacent to a park and across the street from houses and apartments; after Villegas circled the block, the car had been moved; the car was seen a few moments later in the same general vicinity. There is nothing in the record to indicate appellant had committed any traffic violation, that the area in question was a high crime area, or that there was anything unusual about the car's description. The record does not show Officer Villegas had specific and articulable facts such as to justify the temporary detention of appellant's automobile."); *Scott*, 549 S.W.2d at 172-73 (reversing denial of a motion to suppress where arresting officer saw no traffic violation at 1:30 a.m., received no relevant police dispatch, knew there were thefts in the area, and believed the area was "high crime"); *Faulkner v. State*, 549 S.W.2d 1, 2 (Tex. Crim. App. 1976) ("The inarticulate hunch, suspicion, or good faith of the officer in suspecting the car to be stolen was insufficient to constitute probable cause for an arrest, or even a temporary detention."); *Hernandez v. State*, 376 S.W.3d 863, 870 (Tex. App.—Fort Worth 2012, no pet.) (reversing the denial of a motion to suppress where arresting officer found appellant in a poorly lit and empty strip mall parking lot "sometime after 2:00 a.m. . . . with its headlights on, left turn signal flashing, and driver's side door open"; "curiosity or 'wondering about maybe a possible break-in' amount[ed] to nothing more than an inchoate and general suspicion or hunch") (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968) and *Woods v. State*, 956 S.W.2d 33, 35 (Tex. Crim. App. 1997)); and *Jones v. State*, 926 S.W.2d 386, 389 (Tex. App.—Fort Worth 1996, pet. ref'd) (reversing denial of a motion to suppress where officer stopped appellant because he drove out from behind a clump of trees in an unlit public park without a curfew at 10:25 p.m.); *but see Smith v. State*, 813 S.W.2d 599, 602 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) ("Here, appellant was observed sitting in an automobile parked on a dark and isolated road. The encounter occurred in the early morning hours in a high crime area known for the recovery of numerous stolen vehicles, many of which were of the same make and model as the one observed. The automobile's engine and lights were turned off. A second individual was doing something under the hood. Under the hood the officers observed the presence of two batteries and an unusual array of non-factory wiring. Based upon these facts, the officers were suspicious that the appellant and his companion were stripping a stolen vehicle. Because we find these specific articulable facts sufficient to constitute reasonable suspicion, we hold that the investigative stop of appellant was justified."). *Cf. Hinson v. State*, 547 S.W.2d 277, 279 (Tex. Crim. App. 1977) ("Although there had been thefts committed at the airport, there was not even a hint of suspicion that the appellant was involved in these activities.").

B. The park-and-ride was not a high crime area.

The trial court also erred when it concluded that three to four service calls over the course of several months to a business that is open 24 hours a day constitutes a "high crime area" capable of contributing to the reasonable suspicion calculus based on presence therein alone. The United States Supreme Court has held that whether a stop occurs in a "high crime area" is "among the relevant contextual considerations in a *Terry* analysis." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (citing *Adams v. Williams*, 407 U.S. 143, 144, 147-48 (1972)). However, the protections afforded by the United States and Texas Constitutions are not abrogated simply because an officer subjectively believes an area is properly designated as "high crime". *See Gurrola v. State*, 877 S.W.2d 300, 303 (Tex. Crim. App. 1994) (en banc) (high-crime reputation of the area where the detainees were seen cannot serve as the basis for an investigative stop) (citing *Amorella v. State,* 554 S.W.2d 700, 701 (Tex. Crim. App. 1977)); *see also Malik v. State*, No. 14-92-01293-CR, 1996 WL 65639, at *3 (Tex. App.—Houston [14th Dist.] Feb. 15, 1996) (mem. op., not designated for publication) ("As a matter of law, the mere description of an area as a high crime area is insufficient to support a reasonable and articulable suspicion to justify an investigatory stop.") (citing *Comer v. State*, 754 S.W.2d 656, 658 (Tex. Crim. App. 1986) and *Benton v. State*, 576 S.W.2d 374, 377 (Tex. Crim. App. [Panel Op.] 1978)), *vacated on other grounds*, 953 S.W.2d 234 (Tex. Crim. App. 1997).

Here, the trial court made written findings of fact that the area in question was a "high crime area" and we are obliged to uphold this finding if it is supported by the record. *Baird v. State*, 398 S.W.3d 220, 226 (Tex. Crim. App. 2013). Here, the record contains no evidence which supports a finding that the park-and-ride was a "high crime area"; we should therefore hold the trial court's finding was erroneous.

Specifically, the trial court heard evidence that Officer Cox had patrolled the

area for about ten years and had made three to four service calls to that area over the course of several months. First, there is no evidence that anyone committed a crime during those service calls; instead, the reasonable inference is only that someone called the police for some unidentified form of assistance. Second, there is no evidence anyone was arrested during those service calls. Third, if it was a high crime area, Officer Cox's ten years patrolling it should have yielded additional testimony establishing that fact. Fourth, three to four service calls over the course of several months to an establishment that is perpetually open does not constitute a "high crime area"; concluding otherwise would obliterate the significance of the Supreme Court's test, effectively convert every neighborhood in every sizable Texas city to a high crime area, and undermine the reasonableness component of Fourth Amendment jurisprudence. *See Klare*, 76 S.W.3d at 75 ("reasonable suspicion cannot be based solely on [the officer's] knowledge that burglaries have previously occurred at that locale.") (citing *Brown v. Texas*, 443 U.S. 47 (1979) (reversing a conviction when officers stopped and searched the defendants only after viewing them in an area notorious for drug trafficking, and the officers were unable to articulate any basis for their conclusion that the defendants "looked suspicious")).

The Court of Criminal Appeals' holding in *Ceniceros v. State* is instructive in this regard. 551 S.W.2d 50, 55 (Tex. Crim. App. 1977). There, the arresting officer saw four men standing on a sidewalk in an area that had "a number of recent burglaries"; the court reversed the denial of defendant's motion to suppress and carefully explained its reasoning.

> The only facts the officer had at the initiation of his investigation were (1) a number of recent burglaries in the area and (2) four men standing together on a sidewalk at an intersection at 10:20 in the morning . . . . If such a suspicion were a reasonable inference from standing on a street corner in this neighborhood, all citizens passing through victimized neighborhoods would be

> suspects, and pedestrian checkpoints could be set up to monitor their comings and goings. Practices of this kind are repugnant to a free society. If victimization by crime becomes the justification for indiscriminate intrusion by the state, then we forfeit the security of our persons and privacy from invasion by the police on a hope of future security from the criminal, and ultimately find ourselves the displaced refugees in a raging war on crime.

Without more, two people parked in a place where they had the right to be cannot give rise to constitutionally sufficient suspicion, particularly where there is no competent evidence that the area in question is "high crime". *Compare Benton*, 576 S.W.2d at 374 (reversing the denial of a motion to suppress when officer conducted a traffic stop at 4:45 a.m. in an area that had "perhaps three recent burglaries in that area" that had "'usually' taken place between three and five in the morning") *with Thompson v. State*, 533 S.W.2d 825, 826 (Tex. Crim. App. 1976) (characterizing an area as "high crime" where "many prowlers had been recently reported.") and *Burton v. State*, No. 14-08-00445-CR, 2009 WL 838271, at *1 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (mem. op., not designated for publication) (characterizing an area as "high crime" where (1) "[m]any of the motels in the area . . . experienced 'a lot of prostitution . . . stolen vehicles . . . [and] drug activity'", (2) the motel in question "had been the scene of multiple arrests"; and (3) the arresting officers had purportedly "made between fifty and one-hundred arrests" at that hotel in the preceding eight months). *Cf. Garcia-Cantu*, 253 S.W.3d at 239 (reversing appellate court's reversal of a trial court's granting of a motion to suppress; although the officer testified that it was a "high crime" area for drugs and prostitution, "he did not dispute that there had been only two drug arrests in the prior six months and no prostitution arrests in that area.").

IV. Conclusion

In contrast to the majority, I would conclude that approaching a person with flashing overhead emergency lights is synonymous with an instruction to stop and not leave and thus constitutes a detention rather than merely an encounter. The investigative detention in this case was unsupported by reasonable suspicion and was therefore unlawful. The Fourth Amendment requires more than inarticulate suspicion or a hunch. The arresting officer here relied upon the time of day and the area where Appellant was located; that is not enough, particularly where the facts do not support reasonable suspicion based upon either circumstance (or even the combination of both circumstances). *See Klare*, 76 S.W.3d at 75 ("Although relevant to our analysis, both time of day and the level of criminal activity in the area are facts which focus on the suspect's surroundings rather than on the suspect himself. Consequently, courts generally require an additional fact or facts particular to the suspect's behavior to justify a suspicion of criminal activity.") (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)). Therefore, I concur.

/s/ Meagan Hassan

Meagan Hassan
Justice

Panel consists of Chief Justice Frost and Justices Wise and Hassan (Frost, C.J., majority).

Publish — Tex. R. App. P. 47.2(b).

CAUSE NO. 224018

THE STATE OF TEXAS	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER ONE
	§	
JACOB MATTHEW JOHNSON	§	BRAZORIA COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 15, 2017, this Court held a hearing on Defendant's Motion to Suppress Evidence, specifically, the officers' initial contact with the defendant. Present at said hearing were: the attorney for the State, attorney for Defendant, and the Defendant. A jury was not present.

FINDINGS OF FACT

1. The charged offense that is the subject of this case occurred on or about August 28, 2016. R. at 13.

2. Sergeant Robert Cox testified that he was on routine patrol around 12 AM. R. at 13.

3. Sergeant Cox further testified that as part of his routine patrol, he regularly checks the park and ride located at the intersection of FM 2004 and FM 523. He regularly spotlights vehicles parked overnight in that park and ride to deter drug activity and burglaries. R. at 15-8.

4. The park and ride at the intersection of FM2004 and FM 523 is a high crime area for burglaries of motor vehicles, drug crimes, and public lewdness. Sergeant Cox testified that he had personally made several arrests in the months prior to this offense for such offenses in that park and ride. R. at 15-8.

5. While conducting his routine patrol on or about the day in question, Sergeant Cox spotted the defendant's vehicle parked in the park and ride and observed movement inside. Other vehicles were present in the park and ride and that defendant's vehicle was parked away from the other vehicles. R. at 18.

6. Sergeant Cox parked behind defendant's vehicle then turned on his overhead lights. R. at 20, 26.

7. Sergeant Cox did not block the defendant's vehicle from leaving when he parked behind it. R. at 21-2.

8. Sergeant Cox then approached defendant's vehicle. R. at 18, 20.

9. Once the defendant rolled down his window, Sergeant Cox observed the defendant's pants to be undone and detected the smell of marihuana. R. at 22.

10. A copy of Sergeant Cox's in-car video was offered but not admitted into evidence. R. at 28-9.

CONCLUSIONS OF LAW

1. Officers do not need reasonable suspicion to initiate a consensual encounter with a citizen. *State v. Woodard* 341 S.W.3d 404 (Tex. Crim. App. 2011). Sergeant Cox's initial encounter with the defendant was a proper consensual encounter that later evolved into an investigative detention.

2. The sole fact that Sergeant Cox activating his overhead lights alone did not elevate the consensual encounter into an investigative detention *State v. Garcia-Cantu* 253 S.W.3d 236, 242-3 (Tex. Crim. App. 2008).

3. If the initial encounter was a detention, it was properly supported by reasonable suspicion of criminal activity as necessary to detain the defendant based on specific, articulable facts, namely: his presence in the park and ride, a high crime area, after the park and ride's normal operating hours. *Terry v. Ohio* 391 U.S. 1 (1968); *Amorella v. State* 554 S.W.2d 700 (Tex. Crim. App. 1981); *Bryant v. State* 161 S.W.3d 758 (Tex. App.-2nd Dist. 2005)(no pet).

Signed and entered on August 2, 2017.

Jerri Lee Mills
Judge Presiding

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